B104 (FORM 104) (08/07)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS COOK, WILLIAM DAVID COOK, JOYCE VASSEY	**DEFENDANTS** BENEFICIAL MORTGAGE CO. OF NORTH CAROLINA
ATTORNEYS (Firm Name, Address, and Telephone No.) O. MAX GARDNER WILLIAM S. GARDNER P.O. BOX 1000 SHELBY, NC 28151-1000	**ATTORNEYS** (If Known)
PARTY (Check One Box Only) X Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin X Creditor ☐ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)
COMPLAINT FOR FAILURE TO RELEASE LIEN

NATURE OF SUIT
(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property
☐ 11- Recovery of money/property - §542 turnover of property
☐ 12- Recovery of money/property - §547 preference
☐ 13- Recovery of money/property - §548 fraudulent transfer
☐ 14- Recovery of money/property – other

FRBP 7001(2) – Validity, Priority or Extent of Lien
☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
☐ 31-Approval of sale of property of estate and of a co-owner-§363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
☐ 41-Objection / revocation of discharge - § 727(c), (d), (e)

FRBP 7001(5) – Revocation of Confirmation
☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
☐ 66-Dischargeability - §523(a)(1), (14), (14A) priority tax claims
☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
☐ 67-Dischargeability-§523(a)(4),fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
☐ 61-Dischargeability - §523(a)(5), domestic support
☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
☐ 63-Dischargeability - §523(a)(8), student loan
☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
☐ 63-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
☐ 71-Injunctive relief – reinstatement of stay
☐ 72-Injunctive relief – other

FRBP 7001(8) – Subordination of Claim or Interest
☐ 81-Subordination of claim or interest

FRBP 7001(9) – Declaratory Judgment
☐ 91-Declaratory judgment

FRBP 7001(10) – Determination of Removed Action
☐ 01-Determination of removed claim or cause

Other
☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
X 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case) failure to release lien

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $TO BE DETERMINED BY THE COURT

Other Relief Sought

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BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR WILLIAM DAVID COOK JOYCE VASSEY COOK	BANKRUPTCY CASE NO. 04-41204	
DISTRICT IN WHICH CASE IS PENDING WESTERN DISTRICT OF NORTH CAROLINA	DIVISIONAL OFFICE SHELBY	NAME OF JUDGE GEORGE R. HODGES

RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY PENDING	DIVISIONAL OFFICE	NAME OF JUDGE

SIGNATURE OF ATTORNEY (OR PLAINTIFF)	
DATE JULY 1, 2010	PRINT NAME OF ATTORNEY (OR PLAINTIFF) O. MAX GARDNER III WILLIAM S. GARDNER

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing a adversary proceeding must also complete and file Form 104, the Adversary Proceeding Cover Sheet, if it is required by the court. In some courts, the cover sheet is not required when the adversary proceeding is filed electronically through the court's Case Management/Electronic Case Files (CM/ECF) system. (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs this information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and **Defendants.** Give the names of the plaintiffs and the defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and in the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN THE MATTER OF:

NAME: **COOK, WILLIAM DAVID** **CHAPTER 13 No. 04-41204**
COOK, JOYCE VASSEY **OUR FILE No. 11282**

ADDRESS: **788 OLD US HIGHWAY 74**
BOSTIC, NC 28018

SSN: **--- -- 4722 & --- -- 6328**

Debtors.

WILLIAM DAVID COOK and wife, **Adv. Proc. No. 10- ______**
JOYCE VASSEY COOK,

Plaintiffs,

versus

BENEFICIAL MORTGAGE CO. OF NORTH CAROLINA,

Defendant.

COMPLAINT SEEKING DAMAGES IN ADVERSARY PROCEEDING FOR FAILURE TO CANCEL DEED OF TRUST AND TO ENFORCE ORDER

Introduction

1. This is an action for actual and punitive damages filed by the debtors for the failure of Defendant to cancel the second deed of trust on the debtors' residence located at 788 Old US Highway 74 in Bostic, Rutherford County, North Carolina.

2. This action is also filed to enforce the Order of Confirmation duly entered in this Chapter 13 case, the Order for Default Judgment duly entered in this case and the Order of Discharge duly entered in this case, and to enforce and to implement other Bankruptcy Code provisions and Rules related thereto, and to prevent an abuse of process and to preclude the frustration of the orderly discharge of the claims in this case.

Jurisdiction

3. Jurisdiction is conferred on this Court pursuant to the provisions of Section 1334 of Title 28 of the United States Code in that this proceeding arises in and is related to the above-captioned Chapter 13 case under Title 11 and concerns real property of the debtors in that case.

4. This Court has supplemental jurisdiction to hear all state law claims pursuant to Section 1367 of Title 28 of the United States Code.

5. Venue lies in this District pursuant to Section 1391(b) of Title 28 of the United States Code.

6. This matter is a core proceeding.

Parties

7. The Plaintiffs in this case were debtors under Chapter 13 of the United States Bankruptcy Code.

8. The Defendant, Beneficial North Carolina, Inc., ("Beneficial"), is organized and existing under the laws of the State of Delaware and has a principal office address of 300 Beneficial Center, Peapack, NJ 07977-0000 and a registered agent mailing address care of CT Corporation System at 150 Fayetteville St., Box 1011, Raleigh, NC 27601. Beneficial was the servicer for the debtors' second mortgage loan.

Factual Allegations

9. The Chapter 13 case of the Plaintiffs herein was commenced by the filing of a voluntary petition with the Clerk of this Court on October 29, 2004.

10. The §341(a) meeting of creditors in this case was held in Shelby, North Carolina on December 10, 2004.

11. The Chapter 13 plan of the Plaintiffs and debtors herein was subsequently confirmed by order of this Court on January 4, 2005.

12. The Defendant filed no objection to confirmation of the plan in this case.

13. In the schedules filed with the petition in this case and on the master mailing matrix filed with the Clerk of this Court, a debt in the amount of $24,727.33 was listed in favor of Beneficial for the second deed of trust on the residential real estate of the debtors. The debtors believed and therefore alleged in their petition and schedules that there was no equity in their residential real estate to which the second mortgage could secure at the time that the loan was made and, therefore, provided for the claim to be paid as an unsecured claim under the terms of the confirmed plan.

14. On or about February 25, 2009, the debtors filed an adversary proceeding in the United States Bankruptcy Court asking the Court to determine the validity, priority and extent of the lien of Beneficial. The Court granted the debtors' request by way of an order of Default Judgment entered on August 31, 2009. The Order granting default judgment provides in part that "upon entry of the discharge order in this case, the Defendant is hereby ordered to cancel and mark paid its second deed of trust and must provide debtors with proof." It also provided "That upon entry of the discharge order in this case, the Defendants are hereby ordered to mark as paid in full all loan documents related to the second deed of trust and to deliver such documents to the debtor."

15. The Plaintiffs made all of the required Chapter 13 plan payments and duly completed their Chapter 13 plan. As a result, a final Discharge Order was duly entered by this Court on or about December 2nd 2009.

16. Since December 2nd, the debtors have been attempting to refinance their house in order to get a fresh start with a lower interest rate. These attempts have been greatly

frustrated because the 2nd deed of trust is still on record with the clerk of court. Beneficial has taken no steps to comply with the August 31, 2009 order and has done nothing to remove the discharged lien from the clerk of court records.

17. On advice of his bankruptcy attorney, the male debtor took the default judgment to the state clerk of court in order to attempt to have them cancel the deed of trust. The clerk refused to record the document or to cancel the deed of trust.

First Claim for Relief

18. The allegations in paragraphs 1 through 17 of this complaint are realleged and incorporated herein by this reference.

19. The actions of Beneficial in failing to cancel the second deed of trust after receiving notice of the order of discharge entered on December 2, 2009 constitute a gross violation of the discharge injunction as set forth in 11 U.S.C. Section 524.

20. As a result of the above violation of 11 U.S.C. Section 524, the Defendant is liable to the Plaintiffs for actual damages, punitive damages and legal fees under Section 105 of Title 11 of the United States Code.

Second Claim for Relief

21. The allegations in paragraphs 1 through 20 of this complaint are realleged and incorporated herein by this reference.

22. As a result of the failure of Beneficial to cancel its second deed of trust on the debtors' residence, the debtors have found it necessary to devote countless and unnecessary hours to their efforts to secure cancelled and marked as paid such deed of trust and that all of this time was unwarranted and unnecessary.

23. The Plaintiffs have worried about this situation and have feared that the Defendant had some improper motive for holding the said deed of trust.

24. The actions of the Defendant in this case constitute a clear violation of the provisions of North Carolina General Statute Section 45-36.3 and Section 45-37.

25. Section 45-36.3 of the North Carolina General Statutes provides in pertinent part as follows:

> **"Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument.**
> (a) *After the satisfaction* of the provisions of any deed of trust or mortgage, or other instrument intended to secure with real property the payment of money or the performance of any other obligation and registered as required by law, the holder of the evidence of the indebtedness, if it is a single instrument, or a duly authorized agent or attorney of such holder *shall within 60 days:*
>
> > (1) *Discharge and release of record such documents and forward the cancelled documents to the grantor, trustor or mortgagor; or*
> > (2) Alternatively, the holder of the evidence of the indebtedness or a duly authorized agent or attorney of such holder, at the request of the grantor, trustor or mortgagor, shall forward said instrument and the deed of trust or mortgage

> instrument, with payment and satisfaction acknowledged in accordance with the requirements of G.S. 45-37, to the grantor, trustor or mortgagor." [emphasis added].

26. The Defendant did not comply with this statute after the entry of the Discharge Order in this case.

27. The actions of the Defendant in this case have been unlawful in nature and as a result the Plaintiffs are entitled to recover both actual and punitive damages as well as legal fees and expenses as provided for by Sections 45-36.3(c) of the North Carolina General Statute.

Third Claim for Relief

28. The allegations in paragraphs 1 through 27 of this complaint are realleged and incorporated herein by this reference.

29. The Plaintiffs are "consumers" as that term is defined by Article 2 of Chapter 75 of the North Carolina General Statutes.

30. The Plaintiffs' relationship with the Defendant arose out of a "consumer debt" as that term is defined in Article 2 of Chapter 75 of the North Carolina General Statutes.

31. The Defendant was and is a "debt collector" as that term is defined by applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

32. Under the provision of Section 75-52 of the North Carolina General Statutes the Defendant was and is prohibited from engaging in any conduct the natural consequences of which is to oppress, harass or abuse any person.

33. The actions and conduct of the Defendant were oppressive and abusive in violation of the applicable provisions of Article 2 of Chapter 75 of the North Carolina General Statutes.

34. As a result thereof, the Defendant is liable for statutory damages in the sum of no less than $4,000.00 for violation of N.C.G.S. Section 75-50, et seq. and the payment of legal fees and expenses.

Fourth Claim for Relief

35. The allegations in paragraphs 1 through 34 of this complaint are realleged and incorporated herein by this reference.

36. The actions and conduct of the Defendant in this case constitute unfair and deceptive acts and practices in violation of the provisions of Section 75-1.1 of the North Carolina General Statutes. Specifically, the unfair acts and practices of Beneficial arose out of its failure to comply with the mandatory provisions of Chapter 45 of the North Carolina General Statutes.

37. As a result of the unfair acts and deceptive practices of Beneficial, the Plaintiffs are entitled to the recovery of actual and treble damages under the provision of Section 75-16 of the North Carolina General Statutes.

38. As a result of the unfair acts and deceptive practices of the Defendant, the Plaintiffs are entitled to the recovery of reasonable legal fees under the provisions of Section 75-16.1 of the North Carolina General Statutes.

Fifth Claim for Relief

39. The allegations in paragraphs 1 through 38 of this complaint are realleged and incorporated herein by this reference.

40. The Order for Default Judgment entered in this case permitted Beneficial to retain the second deed of trust on the debtors' residence "pending entry of the discharge" in this case.

41. The Order for Default Judgment imposed an affirmative duty on Beneficial to cancel and mark as paid all loan documents related to its second deed of trust on the debtors' residence and to deliver the said documents to the Plaintiffs upon entry of the Discharge Order.

42. The failure of Beneficial to cancel its second deed of trust and to deliver the cancelled and marked as paid deed of trust to the Plaintiffs in a timely manner post-discharge was and is in violation of the Order for Default Judgment entered in this case.

43. As a result, the Plaintiffs are entitled to the recovery of actual damages, punitive damages and legal fees.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendant respectfully pray of the Court as follows:

A. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of actual damages;

B. That the Plaintiffs have and recover against the Defendant a sum to be determined by the Court in the form of punitive damages;

C. That the Plaintiffs have and recover against the Defendant all reasonable legal fees and expenses incurred by their attorney;

D. That the Plaintiffs have and recover against the Defendant the sum of $4,000.00 for its violation of N.C.G.S. Section 75-50, et seq.; and

E. That the Plaintiffs have such other and further relief as the Court may deem just and proper.

This the 1st day of July, 2010

____
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